SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 618

FORTNIGHTLY CORPORATION, *Petitioner,*

v.

UNITED ARTISTS TELEVISION, INC., *Respondent.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO THE GRANTING OF THE PETITION FOR A WRIT OF CERTIORARI

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** So cited herein. The lengthy official title is followed by the description, "Second Report and Order". It is indexed in 2 FCC 2d as "CATV".

*** So cited herein. The lengthy official title is followed by the description, "Memorandum Opinion and Order". It is indexed in 6 FCC 2d as "CATV".

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QUESTIONS PRESENTED

The five questions posed by petitioner, Pet. 2-4, are more properly two:

1. Whether petitioner "performs" copyrighted motion pictures "publicly" or "in public", within the meaning of §§ 1(c) and 1(d) of the Copyright Act,

when, in the operation of its CATV systems, it receives, amplifies, and otherwise processes electronically, broadcasts of television stations then broadcasting such copyrighted works under licenses granted by the copyright owner to such television stations for such broadcasts, and retransmits such broadcasts by cable to the 15,000, or so, "homes of members of the public who subscribe to the system[s]; so that the programs broadcast by the station[s] may be viewed by the subscribers on their own television sets".[1]

2. Whether, in consequence of policies of the Copyright Act, or the Federal Communications Act of 1934, as amended, policies thereof, or regulatory action thereunder of the Federal Communications Commission, when television stations broadcast copyrighted motion pictures under licenses granted by the copyright owner to such television stations for such broadcasts, petitioner, although not in fact licensed by such copyright owner for any purpose whatsoever, has a license implied-in-law, by virtue of which petitioner, in the operation of its CATV systems, does not infringe the exclusive right of the copyright owner under §§ 1(c) and 1(d) of the Copyright Act, to "perform" his copyrighted works "publicly" or "in public", by receiving, amplifying and otherwise electronically processing such broadcasts, and retransmitting them by cable, for profit, to the 15,000, or so, "homes of members of the public who subscribe to the system[s]" and pay petitioner for such service, "so that the programs

[1] Pet. 2, 4, 5, 14, 4a, 6a. All "Pet." references are to the Petition. The term "motion pictures" as used in this Brief includes "motion picture photoplays" as well as other motion pictures. See Pet. 3a, fn. 1. The provisions of §§ 1(c) and 1(d) of the Copyright Act are set out at pp. 4 and 5 of the Petition, and in the Appendix hereto, p. 1a.

broadcast by the station[s] may be viewed by the subscribers on their own television sets".[2]

The Court below answered the first question in the affirmative, and the second in the negative.

STATEMENT

A. Television broadcasting stations in Pittsburgh, Pa., Wheeling, W. Va., and Steubenville, Ohio, broadcast certain motion pictures under licenses of respondent as their copyright owner. In the operation of its CATV systems in and about Clarksburg and Fairmont, W. Va., petitioner received such broadcasts, amplified and otherwise processed them electronically, and retransmitted them by cable, for profit, without respondent's license, to the 15,000, or so, "homes of members of the public who subscribe[d] to the system[s]", and paid petitioner for such service, "so that the programs broadcast by the station[s] could be "viewed by the subscribers on their own television sets". Pet. 2, 8, 9, 12, 14, 3a, text and fn. 1, 4a, 6a. Respondent, asserting that the broadcast motion pictures were copyrighted, and that it was the owner of such copyrights, brought this action against petitioner for infringement of its exclusive right to perform them "in public", or "publicly", under §§ 1(c) and 1(d) of the Copyright Act. Pet. 4, 5, 9, 2a, 3a; JA 21-23, 130-154.[3]

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[2] Pet. 2, 5-7, 12, 14, 4a, 6a.

[3] All "JA" references are to the Joint Appendix in the Court below, copies of which have been filed herein by petitioner. All "R" references are to the original record in the Court below, which has been certified to this Court. Pet. 2, fn. 1.

Petitioner's answer raised numerous issues, and the District Court, on respondent's motion, by pre-trial order separated two of such issues for prior trial and determination. Pet. 9, 3a; JA 25, 26, 155-181, 182, 187, 188. The decision of the Court of Appeals to which this petition is addressed, affirmed, upon an interlocutory appeal under Tit. 28 U.S.C. § 1292(b), the non-final decision of the District Court, 255 F. Supp. 177; JA 19-107, in respect only of such two issues. 377 F. 2d 872; Pet. 1a. In its opinion, 377 F. 2d at 874; Pet. 2a, 3a, the Court below succinctly described the two issues before it as follows:

> This interlocutory appeal * * * presents the question whether the * * * CATV * * * systems operated by defendent [i.e., petitioner] * * * infringed the exclusive right of plaintiff [i.e., respondent] * * * to perform its copyrighted motion pictures in public * * * by receiving and transmitting by coaxial cable to their paying subscribers the signals of television broadcasting stations * * * which were licensed to broadcast the motion pictures. A further issue is whether, if defendant's CATV systems did perform plaintiff's copyrighted motion pictures in public, they had a license implied-in-law to do so.

The issues reserved by the District Court for subsequent trial and determination, *and which are yet to be tried,* have been described in general terms by petitioner, as follows, Pet. 9, fn. 4:

> Reserved under the pre-trial order for subsequent trial were affirmative defenses * * * including issues concerning the validity of the plaintiff's [i.e., the respondent's] asserted copyrights, the existence of a license implied in fact by reason of (among other things) plaintiff's course of conduct in dealing with television stations, and the issue of

> estoppel, as well as copyright misuse and antitrust defenses and the question of damages.[4]

As the Court below, and the District Court both noted, Pet. 3a, fn. 2, "the facts concerning the operation of defendant's [i.e., petitioner's] CATV systems are essentially undisputed * * *." Petitioner's radically abbreviated description of such operation, Pet. 2, is that its CATV systems operate

> by receiving through an antenna the signals of a television broadcasting station and transmitting these signals through wires to the homes of members of the public who subscribe to the system, so that the programs broadcast by the station may be viewed by the subscribers on their own television sets.

A CATV system, however, is not "simply a master TV antenna", *Second Report and Order*, 2 FCC 2d 725, 780 (1966), and the complex and sophisticated equipment and processes employed by petitioner are described in detail by the District Court, 255 F. Supp. 177, 187, 188, 190-197; JA 38-40, 44-59, and are summarized by the Court of Appeals. Pet. 6a. It suffices for present purposes to note that before retrans-

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[4] In opposing the separation for prior trial and determination of the two issues with which the decision of the Court below is alone concerned, petitioner's counsel said, R. 3846:

> * * * [Petitioner] cannot agree that * * * there are any questions in this case which are necessarily more important than any other issues. If * * * [respondent] is unable to show that it has a copyright on films on which it sues, * * * of if * * * [petitioner] is able to show that * * * [respondent] has acquiesced in its activities or is barred by estoppel or laches or has misused its copyright, then * * * [petitioner] is not liable to [respondent] * * * and that is all that is involved in this litigation.

mitting television broadcasts by cable "to the homes of members of the public who subscribe to the system", petitioner amplifies, and otherwise processes them electronically. Pet. 14, 6a.

It is clear, also, that petitioner "is a private corporation operating the CATV systems for profit" and that it charges its subscribers for its service. Pet. 4a. As the Court below noted, Pet. 3a, fn. 1, petitioner "has not contended that if it publicly performed the motion pictures it did not do so for profit".

B. In rejecting petitioner's contention, Pet. 7a; cf. Pet. 35-38, that "its CATV systems should not be held to have performed * * * [respondent's] copyrighted motion pictures in public because the motion pictures were not made visible or audible within the systems, but only in the television sets owned and controlled by their subscribers," the Court below said, Pet. 7a:

> We do not think that this fact is decisive. In light of prior decisions and of policies of the Copyright Act, the result brought about by one of defendant's CATV systems—the simultaneous viewing of * * * [respondent's] copyrighted motion pictures on the television sets of as many as several thousand of * * * [petitioner's] subscribers—is fairly characterized as a public performance infringing the copyrights.

Then, following a review of the authorities, the Court below continued, Pet. 11a, 12a:

> Moreover, it would seem anomalous to hold that the operation of defendant's CATV systems did not result in a public performance because defendant's subscribers obtained their own television sets, when a television broadcast received on home television sets constitutes a public performance. [Citation] Defendant's [i.e., petitioner's] re-

> joinder is that in the case of a television broadcasting station a visible or audible rendition of a copyrighted work is given at the station's studio. * * * But as Judge Herlands found, 255 F. Supp. at 190-91, no such rendition accompanies the broadcast of taped and relayed programs or, usually, of motion pictures. * * * A more fundamental defect of the rejoinder is that it disregards the policies of the Copyright Act. A television broadcast of a copyrighted work harms the copyright holder not because a handful or a roomful of persons sees the work performed at the studio, * * * but because thousands of viewers watch it in their homes. Perhaps recognizing this, defendant also contends that it is distinguishable from a broadcaster because the broadcaster is required by the Federal Communications Commission to have a studio for originating programs, generally in the principal community it serves, 47 C.F.R. § 73.613, and to retain the right to select the programs it broadcasts. See 47 C.F.R. § 73.658(e). But the Supreme Court held in *Jewell-LaSalle* that the hotel performed the broadcast musical compositions although it did not select them. Similarly, the fact that a broadcaster chooses the programs it broadcasts, and that defendant's CATV systems did not choose those they distributed, does not mean that the latter did not render public performances.

In answer to petitioner's argument, Pet. 12a; cf. Pet. 33, 34, that since the programs it supplies "are viewed by its subscribers in their homes, any resulting performance by it is private", the Court below said, Pet. 12a, 13a:

> But it is settled that a broadcast or other transmission of a work to the public or a cross-section of it results in a public performance although each individual who chooses to enjoy it does so in

> private. [Citations] In any event, it seems clear to us that when one of defendant's CATV systems enables several hundred of its subscribers to view a program simultaneously, it is engaging in one public performance, not several hundred private ones.

In striking down petitioner's contention, Pet. 15a; cf. Pet. 28, 29, 43-47, that "even if its CATV system publicly performed broadcast copyrighted works, they had a license implied-in-law [under the Copyright Act] to do so where the original broadcast was licensed by the copyright proprietor," the Court below said, Pet. 17a-19a:

> Defendant's [i.e., petitioner's] argument * * * proceeds from the principle that the primary purpose of the Copyright Act is to encourage authors and artists to release their works to the public and that reward to the copyright holder is a secondary aim incidental to this general purpose. [Citations] The secondary aim of reward to the copyright holder is satisfied, defendant [i.e., petitioner] contends, when the holder has been induced to license the original television broadcast, and the Copyright Act's primary policy then requires that CATV systems * * * be allowed to transmit the broadcast signals without further payment to the copyright holder. To buttress this contention, defendant offered to prove at trial that the royalties paid to plaintiff by the original broadcasting stations "took into account or could have taken into account the reception of the broadcasts by defendant's subscribers as well as by other members of the stations' audiences." * * * Since this offer of proof was rejected, we shall assume its accuracy * * *.
>
> Defendant [i.e., petitioner] relies upon holdings that a copyright proprietor may not restrict the

resale of a copyrighted article after he has sold it, *Bobbs-Merrill Co.* v. *Straus,* 210 U.S. 339, 349-51 (1908), and that "when [a] patentee has sold the patented article or authorized its sale and thus granted the purchaser an 'implied license to use,' it is clear that he cannot restrict that use . . ." *Aro Mfg. Co., Inc.* v. *Convertible Top Replacement Co., Inc.,* 377 U.S. 476, 497 (1964); see, e.g., *Adams* v. *Burke,* 17 Wall. (84 U.S.) 453 (1873). Defendant's argument from these holdings paints with too broad a brush. *Bobbs-Merrill Co.* v. *Straus* rested solely upon construction of the copyright holder's exclusive right to vend; the Court held that the first authorized sale of a copyrighted article exhausted that right, and that the purchaser might "sell it again, although he could not publish a new edition of it." 210 U.S. at 350. * * * Mr. Justice Brandeis explicitly rejected the analogy of *Bobbs-Merrill Co.* v. *Straus* in the *Jewell-LaSalle* case, stating: "It is true that control of the sale of copies is not permitted by the Act, * * * but a monopoly is expressly granted of all public performances for profit." 283 U.S. at 197. The patent holdings * * * likewise apply to sales of patented articles; a patent license to manufacture, sell, or use limited, for example, to a given territory or field of use is generally upheld, so long as it does not seek to extend the patent monopoly.

The Court below concluded, Pet. 19a-20a:

> This case presents a very different issue, the divisibility of the copyright holder's exclusive right to perform. In an age of motion pictures and radio and television broadcasting, it would seem self-evident that a copyright proprietor must be allowed substantial freedom to limit licenses to perform his work in public to defined periods and areas or audiences; and his right to do so has apparently never been seriously challenged. * * * [Citations]

> Thus plaintiff could clearly have limited its licenses to the licensee stations' viewers if those stations had been cable television systems. And * * * the fact that the original licensees broadcast furnishes no reason to deny plaintiff [i.e., respondent] the right to limit its licenses to viewers who can receive the broadcasts through normal rooftop antennas. * * * It is true that the difficulty of arranging licenses and the possibility of innocent infringement may be greater when television signals are received "off the air" and transmitted by a CATV system; but such considerations have never been held to justify an implied-in-law license.

With respect to the petitioner's contention, Pet. 20a; cf. Pet. 40, 41, that "if its CATV systems are not granted a license implied-in-law, its subscribers will in effect pay twice for television programs, once by buying the products and services of the advertisers who support the original broadcast and once by paying for CATV service," the Court below said, Pet. 20a, 21a:

> Whatever force this "double payment" contention may have, it must be made to Congress. The fact that it involves purely legislative considerations cannot be obscured by couching it in terms of the primary and secondary policies of the Copyright Act. As a matter of principle, the same problem of "double payment" seems to be presented by any periodical which derives most of its revenues from advertising, but also charges for copies of the periodical, and allows special rates to certain classes of readers. The resolution of such issues of publishing and broadcasting economics has not been entrusted to the courts through the Copyright Act.

The Court below also rejected the petitioner's contention, in effect, that its operations were covered by a

license implied-in-law, Pet. 3a, 18a, fn. 11; cf. Pet. 45-47, because "the imposition of copyright liability upon its CATV systems would clash with the underlying purpose of the Federal Communications Act 'to secure the maximum benefit of radio [and television] to all the people of the United States.'" Pet. 21a. The Court below said, Pet. 22a, 23a:

> It is clear that, at least where defendant's subscribers could not receive the licensed broadcasters' signals satisfactorily by normal antennas, the Federal Communications Act, which lacks a comprehensive scheme of regulatory powers and private remedies, was not intended to preempt the application of the Copyright Act. [Citations] It is significant that the Federal Communications Commission has by implication expressed the same view, stating that its decisions regarding CATV are not intended to affect "'copyright or other rights that broadcasters or others may have in television program material.'" First Report and Order on Microwave Relays, 38 F.C.C. 683, par. 159 (1965).

The Court below noted, Pet. 21a, that the District Court had found that

> "no credible competent evidence was adduced" that subscribers to defendant's [i.e., petitioner's] CATV systems could have received reasonably satisfactory pictures from the five [television] stations in suit by using rooftop antennas * * *

and expressly upheld "Judge Herlands' finding that no such viewers were shown to be among defendant's [i.e., petitioner's] subscribers," Pet. 20a, fn. 13, observing that petitioner "has apparently never contended that" there were. Pet. 21a, 22a, fn. 14.

SUMMARY OF ARGUMENT

1. In holding that "the technical means by which the result is produced are irrelevant", and that petitioner "performed", and "publicly" performed copyrighted motion pictures when it received and retransmitted television broadcasts of such copyrighted works to its thousands of subscribers, the Court below decided no important question of federal law which has not been, but should be, settled by this Court, but applied in the case of a new technology, basic and well-settled legal principles heretofore applied by this Court in cases of earlier new technologies. The exclusive right of a copyright owner to "perform" his copyrighted works "publicly" extends expressly to all such performances "in any manner or by any means whatsoever", no matter how new or novel, and, just as it has been held by this Court that the single rendition of a copyrighted musical selection can result, when broadcast, in more than one public performance, so, too, the single playing of a copyrighted motion picture, when broadcast, can result in more than one public performance. Petitioner's retransmission of a broadcast to its thousands of subscribers is itself a performance, just as a broadcast is, and like a broadcast, it is a public performance, and not multiple private performances, although petitioner's subscribers, like the members of a broadcaster's audience, see the "show" in the privacy of their own homes. To hold otherwise would be to fail to recognize the substance and reality of the matter, no less than the object and intent of the Copyright Act. When petitioner tunes in on a broadcast for its own commercial purposes, it necessarily assumes the risk that in doing so it may infringe the performing right of another.

2. Even assuming, *arguendo,* that because broadcasting is defined as "radio communication intended to be received by the public", the public has a "right" to receive broadcasts, it does not follow that there is, in consequence, a license implied-in-law, by virtue of which petitioner may retransmit to such members of the public as are its subscribers, broadcasts of copyrighted works without authorization of the copyright owners. The exclusive right of a copyright owner under §§1(c) and 1(d) of the Copyright Act being *to perform* his works in public, not *to view* public performances of them, it is the giving of an unlicensed performance of a copyrighted work in public, not the viewing of it, which infringes the copyright owner's right. Thus, while petitioner's subscribers, and other members of the public, may, without risk of infringement, employ every available means, including petitioner's retransmission service, to make it possible for them to view broadcasts of copyrighted works, it does not follow that petitioner is free, without the license of the copyright owner, to retransmit to its subscribers, and thus publicly perform, copyrighted works being broadcast. A copyright owner's license to another to perform his copyrighted work publicly for profit, grants the licensee, and no other, the privilege of performing the work in public; and it does not "release" the work to the public-at-large, or to any segment of it; nor does it "license" the public, or any segment of it, to view such performance, as the viewing public has no need for any such license. A copyright owner licensing another to perform his copyrighted work publicly, may lawfully limit the performance licensed to be given either as to time or place, or both. The compensation paid to a copyright owner for a license to perform a copyrighted work publicly, is the measure

of the copyright owner's reward only for granting the licensee the privilege of giving the particular public performance licensed. It is not the measure of the copyright owner's reward for any other performance of his work, by the licensee, or any other, for the public generally, or for any segment of it. Petitioner's "second payment" argument is wholly without validity, for the plain reason that neither it, nor its subscribers, as such, nor as viewers of television broadcasts, make any payment referable to the copyright royalties paid by the broadcaster. Neither the Copyright Act, nor policies thereof, lend support to petitioner's contention that its public performances for profit of respondent's copyrighted works are covered by a license implied-in-law.

3. Neither the Federal Communications Act, nor any regulatory action thereunder of the Federal Communications Commission, has, or was intended to have any effect whatsoever on copyright, or on the rights of copyright owners, as the Commission has more than once emphasized. Neither the Federal Communications Act, nor policies thereof, nor any regulatory action of the Federal Communications Commission gives rise to any implication that petitioner, although not in fact licensed by respondent, is to be deemed as a matter of law to be licensed to retransmit broadcasts of respondent's copyrighted works to the homes of its thousands of subscribers. The Commission's regulatory action, on which petitioner relies, does not require petitioner to retransmit any broadcasts of copyrighted works in the absence of a license from the copyright owner, if petitioner recognizes copyright liability for its retransmissions of all broadcasts of copyrighted works.

4. There are ample remedies for violations and threatened violations of the antitrust laws, and mis-

use of copyright. Accordingly, the "possibility" that copyrights may somehow be "misused", affords no basis for depriving copyright owners of their rights as such by construing them away, or by constructing licenses implied-in-law, and giving petitioner immunity from copyright liability. Indeed, the considerations point the other way. Regulatory action of the Federal Communications Commission was found necessary to ameliorate the effects of the unfair competition which television broadcasting stations face in consequence of the refusal of CATV systems, including petitioner, to recognize copyright liability. The Federal Communications Commission found it "unfair", that, in the competition between television stations and CATV systems for audiences, the former, but not the latter, pay for their programs, that this unfair competition was inimical to the public interest, and its consequences frustrating of the purpose of the Federal Communications Act to encourage local broadcasting.

ARGUMENT

1. In holding that petitioner performed the copyrighted works, and performed them publicly, the Court below plowed no new fields, and decided no important question of federal law which has not been, but should be, settled by this Court. The Court below properly applied to the circumstances of the case, basic and well-settled legal principles in a way that is in complete harmony with applicable decisions of this Court.

A. While petitioner asserts, Pet. 21, that this is "a case of first impression on the applicability of the federal Copyright Laws to the service provided by a * * * [CATV] system", the decision below does not, as petitioner urges, Pet. 21, involve "an important question of federal law which has not been, but should be, settled by this Court". On the contrary, for while CATV is a new technological development, the Copy-

right Act itself, and the Courts in speaking to it, make unmistakably plain that a copyright owner's exclusive right "to * * * perform" his work "publicly" or "in public" under §§ 1(c) and 1(d) of the Copyright Act, and similar provisions of the Act and prior statutes, is protected against infringement "in *any* manner or by *any* method whatsoever," including the use of wholly new technologies whose advent is still in the future. See, e.g., *Buck* v. *Jewell-LaSalle Realty Co.*, 283 U.S. 191 (1931); *Kalem Co.* v. *Harper Bros.*, 222 U.S. 55 (1911); *Jerome H. Remick & Co.* v. *American Automobile Accessories Co.*, 5 F. 2d 411 (6th Cir. 1925), cert. denied 269 U.S. 556; *Harms, Inc.* v. *Sansom House Enterprises, Inc.*, 162 F. Supp. 129, 134 (E.D. Pa. 1958), aff'd *sub nom. Leo Feist, Inc.*, v. *Lew Tendler Tavern, Inc.*, 267 F. 2d 494 (3d Cir. 1959); *Edison* v. *Lubin*, 122 Fed. 240 (3d Cir. 1903). Thus, it has long been settled by this Court that "The essence of the matter * * * is not the mechanism employed, but that we see the event or story lived", *Kalem*, 222 U.S. at 61, and in *Buck*, 283 U.S. at 196-198, this Court said:

> Although the art of radio broadcasting was unknown at the time the Copyright Act of 1909 was passed, and the means of transmission and reception now employed are wholly unlike any then in use, it is not denied that such broadcasting may be within the scope of the act.
>
> * * *
>
> * * * While this may not have been possible before the development of radio broadcasting, *the novelty of the means used does not lessen the duty of the courts to give full protection to the monopoly of public performance for profit which Congress has secured* to the composer. [Emphasis supplied.]

The holding of the Court below, Pet. 14a, 15a, fn. 9, that "the technical means by which the result is produced are irrelevant", does not involve, as petitioner claims, Pet. 43, a "novel and expansive construction" of the exclusive right of copyright owners "to perform" their copyrighted works in public. In reaching that conclusion the Court below did no more than apply in circumstances presented by a newer technology, the basic and well-settled legal principles applied by this Court in *Kalem,* on the advent of motion pictures, and in *Buck,* on that of radio.

B. Nor did the Court below depart from basic and well-settled principle in holding, Pet. 7a, 12a, 13a, that petitioner engages in "a public performance", and not, as petitioner contends, Pet. 33, 34, in "multiple private performances". This contention, once the reliance of broadcasters, has long since been discredited. In *Jerome H. Remick & Co.* v. *American Automobile Accessories Co.,* 5 F. 2d 411, 412 (6th Cir. 1925), cert. denied 269 U.S. 556, the Court said:

> A performance, in our judgment, is no less public because the listeners are unable to communicate with one another, or are not assembled within an inclosure, or gathered together in some open stadium or park or other public place. *Nor can a performance, in our judgment, be deemed private because each listener may enjoy it alone in the privacy of his home.* Radio broadcasting is intended to, and in fact does, reach a very much larger number of the public at the moment of the rendition than any other medium of performance. [Emphasis supplied.]

In *Messager* v. *British Broadcasting Company, Ltd.,* 138 L.T. 571, 572-3 (C.A. 1928), [1928] 1 K.B. 660

(C.A. Mem., cited by this Court in *Buck,* 283 U.S. at 197, fn. 3, Lord Justice Scrutton said:

> * * * in the Court below they [ie. the defendants] said—and I admire their courage in saying it—that though they were giving a performance to be heard by hundreds of thousands of people, it was not a public performance. As I say, I admire their courage in saying it.
>
> McCardie, J., who tried the case, found, as one would expect, that it was a public performance * * *.
>
> * * * in this Court their courage failed them, and very properly, if I may say so, they have not argued that intentionally to talk to 100,000 people is not a public performance * * *.

Mr. Justice McCardie had ruled, [1927] 2 K.B. 543, 548, 549:

> If I did not hold this to be a public performance by the defendants I should fail to recognize the substance and reality of the matter and also the object and intent of the Copyright Act.

C. The exclusive right reserved to copyright owners by §§ 1(c) and 1(d) of the Copyright Act, is to perform their works "publicly", or "in public", not to view them, and nothing in the decision below "extends", as petitioner claims, "copyright restrictions * * * to the reception and viewing of publicly broadcast television programs by members of the * * * public in their own homes on their own television sets". Pet. 21. The decision below is, rather, that in retransmitting for profit broadcasts of copyright works to its 15,000, or so, subscribers, Pet. 4a, petitioner, like the broadcaster, engages in a public performance, which, if unlicensed,

infringes the exclusive right reserved by §§ 1(c) and 1(d) of the Copyright Act to the copyright owner.

Petitioner's truncated quotation, Pet. 31, from *Bobbs-Merrill,* 210 U.S. at 346, and the phrase with which petitioner introduces it, are misleading. What this Court said was that:

> The copyright statutes ought to be reasonably construed, with a view to effecting the purposes intended by Congress. They ought not to be unduly extended by judicial construction to include privileges not intended to be conferred, *nor so narrowly construed as to deprive those entitled to their benefit of the rights Congress intended to grant.* [Emphasis supplied.]

This Court made no reference, nor would it, to the Copyright Act as being, Pet. 31, "a limited monopoly granted by Congress in derogation of the general policies against monopolies * * *." Article 1, section 8, clause 8, of the Constitution expressly empowers the Congress to grant "for limited times to authors and inventors the exclusive right to their respective writings and discoveries," and there have been copyright acts on the statute books since 1790. Act of May 31, 1790, c. 15, 1 Stat. 124. The Constitution makes no reference to any so-called "general policies against monopolies," and none appeared on the statute books until a whole century later. Act of July 2, 1890, c. 647, 26 Stat. 209.

Petitioner misconceives the policy of the Copyright Act as being crudely to lure a copyright owner to "release" his work "to the public", and that once it is so released for any purpose, howsoever limited, it is, in effect, to be considered as being in the public domain free to be used, for profit, by anybody, without regard to the "harm" thereby done to the copyright owner

"by dilution of markets", or otherwise "disrupt[ing] the owner's exploitation" of the product of his creative genius. Pet. 38, 43. But while it has been said that "the primary object in conferring the monopoly" is "in the general benefits derived by the public from the labors of authors", *Fox Film Corp.* v. *Doyal,* 286 U.S. 123, 127 (1932), and that the "reward" to the copyright owner is "a secondary consideration", *U. S.* v. *Paramount Pictures,* 334 U.S. 131, 158 (1948), nevertheless, as this Court made it clear in *Fox,* 286 U.S. at 130:

> Copyright is a right exercised by the owner during the term at his pleasure and exclusively for his own profit and forms the basis for extensive and profitable business enterprises. The advantage to the public is gained merely from the carrying out of the general policy in making such grants * * *.

Indeed, the Copyright Act is "intended * * * 'to afford greater encouragement to the production of literary works * * *' ", *Washingtonian Pub. Co., Inc.* v. *Pearson,* 306 U.S. 30, 36 (1939) and, as this Court said in *Mazer* v. *Stein,* 347 U.S. 201, 219 (1954):

> The economic philosophy behind the clause empowering Congress to grant patents and copyrights is the conviction that encouragement of individual effort by personal gain is the best way to advance public welfare through the talents of authors and inventors in "Science and useful Arts". Sacrificial days devoted to such creative activities deserve rewards commensurate with the services rendered.

It is in this frame of reference that one must read §§ 1(c) and 1(d) of the Copyright Act, which grant to the copyright owner the "exclusive right" not merely to one public performance, but "expressly" to "all

public performances" of his work during the term of the copyright. *Buck*, 283 U.S. at 197. Clearly, any holding that petitioner's retransmission, for profit, to its 15,000, or so, subscribers, Pet. 4a, of a broadcast of a copyrighted work (in itself concededly a public performance) was not a public performance, would be tantamount to a holding that the copyright owner's "exclusive right" to public performances by the broadcast of his work was exhausted by one single performance. Whenever a broadcast of a copyrighted work is retransmitted by CATV into an area where local broadcasting stations have not been licensed to broadcast such work, such retransmission destroys or impairs that market for the copyrighted work, since, it is obvious, the stations serving that area will not buy and pay for, or at most will pay less for, a license to broadcast a motion picture that has already been exploited in their market. See, p. 32, *infra*.

Moreover conceivably, and, perhaps, in the not too far distant future, CATV systems may blanket the whole country and be in a position to retransmit, for profit, to their subscribers everywhere any broadcast originating anywhere.[5] Indeed, the record shows, and the District Court's undisturbed finding is that petitioner retransmits broadcasts to subscribers "beyond the radio horizon of * * * the television stations" making the broadcasts, i.e., outside the broadcasting stations' actual service areas. 255 F. Supp. at 185; JA 32. Any construction of the phrase "perform it in public in any manner or by any method whatsoever", as used in §§ 1(c) and 1(d) of the Copyright Act, as not includ-

[5] See, *Second Report and Order*, 2 FCC 2d 725, 741, 742 (1966); Roger Clipp, as quoted in "Cobb Heads NAB; Code Changes Delayed", *Television Digest*, July 3, 1967, p. 1, at p. 2.

ing petitioner's retransmission to its thousands of subscribers, of broadcasts of copyrighted works, would contravene the injunction of *Bobbs-Merrill;* 210 U.S. at 346, that copyright statutes are not to be

> * * * so narrowly construed as to deprive those entitled to their benefit of the rights Congress intended to grant.[6]

D. The petitioner's tortured analysis, Pet. 29-37, of *Buck,* 283 U.S. 191, is a futile exercise in sophistry, for the relevant teaching of *Buck* is contained in these lines, 283 U.S. at 197, 198:

> The defendant next urges that it did not perform because there can be but one actual performance each time a copyrighted selection is rendered; and that if the broadcaster is held to be a performer, one who, without connivance, receives and distributes the transmitted selection cannot also be held to have performed it. But nothing in the act circumscribes the meaning to be attributed to the term "performance," or prevents a single rendition of a copyrighted selection from resulting in more than one public performance

[6] *White-Smith Music Publishing Co.* v. *Apollo Co.,* 209 U.S. 1 (1908) on which petitioner relies, Pet. 38, fn. 36, is not to the contrary. There, in concluding that a perforated music roll for use with a playing-piano was not a "copy" of a coprighted musical composition within the meaning of the copyright statute then in effect, the Court relied largely on circumstances strongly evidencing an express intention on the part of the Congress that such rolls not be considered copies. 209 U.S. at 12-15. Since copyright is "wholly statutory", Pet. 28, any "harm" that might result to copyright owners in consequence of a construction predicated on the express intention of the Congress, would, of course, be wholly immaterial. But, where, as here, there are no extraneous aids to determining the intention of the Congress, that one of alternative constructions of the Copyright Act would whittle away rights clearly granted to copyright owners is sufficient ground for rejecting it. *Herbert* v. *Shanley Company,* 242 U.S. 591 (1917).

> for profit. While this may not have been possible before the development of radio broadcasting, the novelty of the means used does not lessen the duty of the courts to give full protection to the monopoly of public performance for profit which Congress has secured to the composer. [Citations] No reason is suggested why there may not be more than one liability.

What this Court thus said is equally applicable here, although what petitioner has done was not possible before the development of CATV.

It is wholly immaterial, too, whether what the petitioner does is, technically speaking, "broadcasting". See Pet. 33-38. For, the fact remains that petitioner is engaged, for profit, in bringing into some 15,000 "homes of members of the public", Pet. 2, 4a, the respondent's copyrighted motion pictures, to become audible and visible on the homeowners' television sets when turned on by somebody acting independently of petitioner. This is precisely what broadcasters do, and it can make no difference under the Copyright Act whether the electronic impulses achieving this result are transmitted over the air by a broadcaster, or are transmitted by cable, as the petitioner does.

Nor is it, in this context, other than a distinction without a difference that broadcasters do the "selecting, originating, and procuring" of programs, Pet. 37, while it serves petitioner's purpose to ride the broadcasters in "piggy back" fashion, and to retransmit "to the homes of members of the public who subscribe to the system", Pet. 2, the programs which result from the broadcasters' efforts. That petitioner thus spares itself the time, effort, and expense to which broadcasters necessarily go to arrange programs attractive

to both advertisers and audience manifestly affords no basis for concluding that the petitioner need pay no heed to the exclusive rights reserved by §§ 1(c) and 1(d) of the Copyright Act to the owners of the copyrights on the motion pictures included in the programs petitioner retransmits to its subscribers. In any event, petitioner's premise is wholly untenable, for when it selects for retransmission the broadcasts of certain television stations rather than those of others, petitioner is, in a very real sense, selecting programs. The "CATV operator—not the individual subscriber—determines which stations (and sometimes which programs) will be available on the system". *First Report and Order,* 38 FCC 683, 702 (1965). And, as this Court said in *Buck,* 283 U.S. at 198, 199, when one "tunes in on a broadcasting station, *for his own commercial purposes,* he necessarily assumes the risk that in doing so he may infringe the performing right of another." [Emphasis supplied.]

Petitioner literally grasps at a shadow and lets the substance escape when it urges, Pet. 31-38, that a broadcasting station's admitted public performance is to be found, not in the broadcast but, rather, in the "live" performance in the studio or in "the playing of a * * * motion-picture film" in the studio, when the broadcaster "substitutes" a filmed program for a "live" one. Pet. 36, 37. "The Act", petitioner notes, Pet. 37, "expressly recognizes that the playing of a * * * film * * * on which the copyrighted work is recorded constitutes a 'performance' of the work". But petitioner leans on a slim reed, if reed it be at all, when, emphasizing that it "plays" no motion picture film, Pet. 37, 38, it argues that no public performance, but only "multiple private performances" result when

it retransmits to its subscribers broadcasts of respondent's copyrighted motion pictures for viewing by them in their own homes, on their own television sets. Pet. 33, 34.

Both principle and authority require the conclusion of the Court below, Pet. 7a, 13a, that the "result brought about" and "clearly intended" by petitioner—the "simultaneous viewing" of respondent's copyrighted works "on the television sets of as many as several thousands" of its "subscribers"—is "fairly characterized as a public performance". And, the utter hollowness of petitioner's contention is laid bare by its distortion, Pet. 33, of this conclusion of the Court below, and its attempted rejoinder, Pet. 33, 34, that "it is clear that the viewing by subscribers in their homes is a private performance and is conceded to be non-infringing". For, "viewing" by petitioner's subscribers in their own homes is non-infringing, not because the CATV performances they *watch* are "private" as they clearly are not, but because the exclusive right reserved to copyright owners by §§ 1(c) and 1(d) of the Copyright Act, is "to perform" their copyrighted works in public, not "to view" such performances of them. Of course, if in ordinary circumstances, by "tuning in" on petitioner's retransmissions of television broadcasts, petitioner's subscribers may, by any stretch of the imagination, be considered as thereby "performing" the copyrighted works, *their* "performances" would be non-infringing as not being "in public". See, *Society, etc.* v. *New York Hotel Statler Co.*, 19 F. Supp. 1, 3 (S.D.N.Y. 1937), *per* Woolsey, J.

E. Petitioner is mistaken in its reliance, Pet. 41, on *Aro*, 377 U.S. 476 (1964). For, whatever may be the consequences of the *sale* of a patented *chattel*, or, of a

copyrighted *book,* for that matter, *Bobbs-Merrill,* 210 U.S. 339, this Court made it clear in *Buck,* 283 U.S. at 197, that an unlicensed retransmission to any segment of the public of a public performance by broadcast of a copyrighted work infringes the right of the copyright owner under §§ 1(c) and 1(d) of the Copyright Act. Thus, this Court said, 283 U.S. at 197:

> The argument here urged * * * is that, since the transmitting of a musical composition by a commercial broadcasting station is a public performance for profit, control of the initial radio rendition exhausts the monopolies conferred—both that of making copies * * * and that of giving public performances for profit * * *; and that a monopoly of the reception for commercial purposes, of this same rendition, is not warranted by the act. The analogy is invoked of the rule under which an author who permits copies of his writings to be made cannot, by virtue of his copyright, prevent or restrict the transfer of such copies. Compare *Bobbs-Merrill Co.* v. *Straus,* 210 U.S. 339. *This analogy is inapplicable. It is true that control of the sale of copies is not permitted by the act, * * * but a monopoly is expressly granted for all public performances for profit.* [Emphasis supplied]

Neither *U. S.* v. *Arnold Schwinn & Co.,* 388 U.S. 365 (1967), nor *Adams* v. *Burke,* 84 U.S. [17 Wall.] 453 (1873), Pet. 43, supports petitioner's contention. Thus, the holding of *Schwinn* is that it is a *per se* violation of § 1 of the Sherman Act when a manufacturer and his vendees agree to restrict the territory within which, or the persons to whom, the *vendees* may resell his products. And, the holding of *Adams* is that where a patentee has assigned to another his right to manufacture, sell and use the patented article within a specified territory, the assignee cannot restrict *purchasers* of such articles from him,

to using them within the territory specified. A license to perform a copyrighted work in public involves no sale, and no physical article, patented or otherwise. Such a license conveys no interest in the copyright, and is merely a waiver by the copyright owner, to the extent it provides, of the copyright owner's exclusive right under §§ 1(c) and 1(d) of the Copyright Act to perform his work publicly. Cf. *De Forest Radio Telephone & Telegraph Co.* v. *United States,* 273 U.S. 236, 238 (1927); *Goldsmith* v. *C.I.R.,* 143 F. 2d 466, 467 (2d Cir. 1944), cert. denied 323 U.S. 774, *per* L. Hand, J. The analogies of *Aro, Schwinn* and *Adams* are no more applicable than that of *Bobbs-Merrill,* which this Court rejected in *Buck,* 283 U.S. at 197.

F. Petitioner's statistics, Pet. 23, with respect to the number of CATV systems, and the number of homes and persons served by them, are wholly irrelevant other than to demonstrate beyond peradventure of doubt, the public nature of CATV performances, and the extent to which the rights of copyright owners have been, and are being trespassed upon. That CATV systems and their subscribers have multiplied is also wholly beside the point. So, too, is the global amount of damages, Pet. 24, to which CATV systems in general might possibly, as a theoretical matter, be subject if the decision below stands. See, p. 51, *infra.* The proliferation of pirates has never been deemed an adequate reason for condoning piracy, nor has the popularity of black markets been considered any reason for sanctioning the means by which their shelves are stocked. The possible consequences of infringement, Pet. 24, could, and should have been considered by the petitioner and other CATV operators when they first embarked, and then continued on their course of

conduct after the notice implicit in the commencement of this action in June 1960. Petitioner's plaint is reminiscent of the prisoner who, when about to be sentenced for murdering his parents, sought clemency as an orphan.

Petitioner's reliance on the *ex parte* statement (Pet. 26, 27) before a Senate subcommittee of a Department of Justice officer is misplaced. Mr. Zimmerman, who normally serves as "first assistant" in the Department's Antitrust Division, was not construing the Copyright Act, but was, rather, addressing himself to a Copyright Law Revision Bill[7] which recognized CATV liability for copyright infringement, urging that the Bill be amended expressly to exempt CATV from all, or practically all, such liability.[8] Given his way, the Congress would legislate out of existence, at least so far as concerns CATV, the "monopoly * * * expressly granted of all public performances for profit". *Buck,* 283 U.S. at 197. While the considerations put forward by Mr. Zimmerman may possibly be matters to be weighed by the Congress in its deliberation of proposed legislation, they are utterly irrelevant to the construction and application of existing law. As the Court said in *Jerome H. Remick,* 5 F. 2d at 411, 412:

> Bills have been introduced in both House and Senate to permit broadcasting without infringing

[7] S. 1006, 89th Cong., 1st Sess., 1965.

[8] Mr. Zimmerman's statement appears in full in *Copyright Law Revision—CATV,* Hearings on S. 1006, Subcommittee on Patents, Trademarks and Copyrights, Senate Committee on the Judiciary, 89th Cong., 2d Sess., August 2, 3, 4, and 25, 1966, at pp. 211-219. Mr. Zimmerman's basic misconceptions concerning the nature of copyright, and of CATV and television operations, are succinctly pointed out in the statement of Herman Finkelstein, general counsel of the American Society of Composers, Authors and Publishers, *ibid.,* pp. 230 *et seq.*

> copyrights. The rights of composer, producer, performer, and the public under this new method of reproduction are eminently matters for considered legislation; but, until Congress shall have specifically determined the relative rights of the parties, we can but decide whether and to what extent statutes covering the subject-matter generally, but enacted without anticipation of such radical changes in the method of reproduction, are fairly construed, applicable to the new situation.

Petitioner's reference, Pet. 22, to the statement of the Register of Copyrights before a Senate Subcommittee, is similarly irrelevant, as Mr. Kaminstein, like Mr. Zimmerman, was addressing himself to proposed legislation, and not to the Copyright Act. In this context, however, it may be observed, that when Mr. Cary, the Deputy Register of Copyrights, earlier appeared before a House Subcommittee, in Mr. Kaminstein's absence due to illness, he said:[9]

> * * * it is our view that the CATV operators are making a performance to the public of a copyright owner's work. This performance results in a profit which in all fairness the copyright owner should share. Unless he is compensated, the performance can have damaging effects upon the value of the particular copyright. For these reasons, therefore, we have not included an exemption for commercial community antenna systems in the bill.

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[9] Hearings on H.R. 4347, H.R. 5680, H.R. 6831, H.R. 6835, Subcommittee No. 3, H. Committee on the Judiciary, 89th Cong., 1st Sess., 1965, Part 1, p. 36.

2. Petitioner's contention that in consequence of the Copyright Act and policies thereof, and since broadcasting is defined as "radio communication intended to be received by the public," it has a license implied-in-law, is wholly without substance, and the holding of the Court below that petitioner has no such license is altogether correct.

Petitioner in effect argues, Pet. 6, 45, 46, that since "broadcasting" is defined in the Federal Communications Act as "radio communication intended to be received by the public", its subscribers, as members of the public, have a right to receive broadcasts, which carries with it a license implied-in-law under the Copyright Act, by virtue of which petitioner may retransmit to its subscribers broadcasts of copyrighted works without authority from the copyright owners for such retransmissions. But, even assuming, *arguendo,* that the public has such a "right," which at best must be dubious, to state the proposition is to refute it. Certainly, no one would suggest that the right to travel abroad, which this Court recognized in *Kent* v. *Dulles,* 357 U.S. 116 (1958), carries with it a license implied-in-law permitting those engaged in supplying the land, sea and air transportation essential to the exercise of such right, freely to use the patents they need in order to render such service.

Contrary to petitioner's claim, Pet. 46, no member of the public viewing an unlicensed performance of a copyrighted work thereby runs any "risk of infringement" under the decision of the Court below. The exclusive right secured to copyright owners by §§ 1(c) and 1(d) of the Copyright Act is *to perform* their works in public, not *to view* them, and accordingly the risk of infringment is not run by viewers of an unlicensed public performance, but by those who perform it. While the public is, accordingly, free, without risk

of infringment, to utilize the retransmission service of "entrepreneurs" like petitioner, Pet. 46, it does not follow, necessarily or otherwise, that such "entrepreneurs" are by that token authorized without license-in-fact, publicly to perform copyrighted works by retransmitting broadcasts of such works for profit to members of the public who are their subscribers.

Thus, it is not an "anomaly", as petitioner claims, Pet. 44, that under the decision of the Court below while "the individual homeowner could take such steps as he wishes to install an adequate antenna of his own without infringement, an entrepreneur may not supply an antenna service to a number of homeowners so that they may watch the performance in their homes". Once again, the distinction is, of course, between *watching* a performance and *giving* one.

Nor has it ever heretofore been suggested that by licensing a public performance of a copyrighted work in one place, e.g., Pittsburgh, the copyright owner loses his exclusive right to other public performances of the work in the same place, or in other places, e.g., Clarksburg, W. Va., Los Angeles, or New York. Indeed, in *Manners* v. *Morosco,* 252 U.S. 317, 325 (1920) this Court recognized that a license to perform a copyrighted work publicly "within * * * territorial limits", reserves to the copyright owner his exclusive right to perform it publicly elsewhere. See also, *Interstate Circuit, Inc.* v. *U. S.,* 306 U.S. 208, 227, 228 (1939).

The horror petitioner expresses, Pet. 41, 42, at the thought that the Court below should "explicitly" sanction "territorial zones by copyright licenses", and that the respondent "has attempted to draw such lines in its licenses," must be feigned. Licenses publicly to

perform copyrighted works have historically and traditionally been limited "territorially" to a particular theater, or group of theaters, or to a particular community or region, and such licenses have, of course, been judicially enforced. See, e.g., *Metro-Goldwyn-Mayer D. Corp.* v. *Bijou Theatre Co.*, 59 F. 2d 70 (1st Cir. 1932); *Tiffany Productions* v. *Dewing*, 50 F. 2d 911 (D. Md. 1931). Clearly, in licensing public performances of a copyright work, it is the copyright owner's right to specify that the performances licensed may be given only "within the territorial limits stated" in the license. *Manners* v. *Morosco*, 252 U.S. at 325. Cf. *Second Report and Order*, 2 FCC 2d 725, 778 (1966), where the Federal Communications Commission said:

> A television station normally obtains the right to exhibit non-network programs by outright payments to program suppliers, from whom the station usually secures the exclusive right to exhibit the programs within a particular geographical area and for a particular length of time. This exclusivity reflects the judgment that presentation by others of a program such as a feature film within the station's market within some period of time obviously reduces the audience and the value of the program to the station. As we noted, the amount and kind of exclusivity that can be created is restricted by the antitrust laws. But those laws permit the creation of substantial exclusivity as a normal incident of the program distribution process * * *.

Petitioner argues that it is free without license to retransmit "to the homes of members of the public" who are its subscribers, Pet. 2, licensed broadcasts of respondent's copyrighted motion pictures because

"The copyright owner has received his reward for the release to the public which the station * * * intends to serve when it makes its broadcast". Pet. 39.

But, petitioner misconceives the scope of the terms "publicly" and "in public" in the context of §§ 1(c) and 1(d) of the Copyright Act. To license another to perform a copyrighted work "publicly", or "in public", is not, as petitioner seems to think, Pet. 39, to "release" it "to the public" which the licensee "intends to serve". It is rather, but a license authorizing the *licensee,* but no other, to perform the work "in public", at the time and place, and in the manner specified in the license.

In licensing a broadcasting station, the copyright owner licenses the broadcasting station publicly to perform the copyrighted work, and that, and nothing else, is what the copyright owner is paid for. It is wholly immaterial that the measure of the fee charged may have been the estimated size of the broadcasting station's audience, Pet. 40, even assuming *arguendo,* although the Court below considered it "debatable", Pet. 17a, that it may have been over-estimated because in certain areas theoretically "served" by the broadcasting station, its broadcasts cannot be received, or received satisfactorily. It has never heretofore been as much as suggested that when a copyright owner licenses the public performance of a copyrighted work in a particular theater on a given night, with royalties based on the theater's capacity, and the theater is only half filled, a stranger to the license (or, indeed, to any license, for that matter) is free, without license, publicly to perform the work that same night, in a second theater, to an audience no greater than half the first

theater's capacity. That, however, is precisely the measure of petitioner's claim.

Petitioner's "second payment" argument, Pet. 38-43, is a witch's brew of bad law and singularly doubtful economics. It comes, moreover, with ill grace from one who "without paying anyone", *First Report and Order*, 38 FCC 683, 704 (1965), engages, for profit, in the business of retransmitting "to the homes of members of the public" who pay for its service, Pet. 2, the valuable work-product of others, i.e., television programs, which, in turn, incorporate the valuable copyrighted works of still another, i.e., respondent's motion pictures.

Petitioner argues that the decision of the Court below "authorizes the extraction of a second payment—a second royalty for the same broadcast", because "the copyright owner has received his payment—his reward" from the broadcaster. Pet. 38-40. But petitioner itself asserts, Pet. 39, it "is not a broadcaster," and, in any event, it is clear, petitioner is in no case the broadcaster who has paid a license fee to the copyright owner for the privilege, personal to the broadcaster, of publicly performing the copyrighted work by broadcasting it. However, when the licensed broadcaster exercises the privilege granted to him by the copyright owner, petitioner receives the broadcast and retransmits it by cable, for profit, "to the homes of members of the public who subscribe to the system" and pay petitioner for its service. Pet. 2, 12, 14, 6a. Broadly speaking, what the Court below held was that the copyright owner was entitled to payment from the petitioner for the petitioner's use, in the manner described, of the copyrighted work. More technically put, the Court below held that what petitioner did constituted a second public performance of the copyrighted

work, distinct from that of the broadcaster, and that being unlicensed, the petitioner was liable as an infringer. As this Court said in *Buck,* 283 U.S. at 198:

> * * * nothing in the Act * * * prevents a single rendition of a copyrighted selection from resulting in more than one public performance for profit.

Since §§ 1(c) and 1(d) of the Copyright Act reserve to the copyright owner the "exclusive right" to all public performances, it is the copyright owner's clear right to be compensated for each public performance of his work. "No reason is suggested why there may not be more than one liability". *Buck,* 283 U.S. at 198.

Petitioner argues, Pet. 40, that "[a]lthough the copyright owner had already been compensated by the broadcaster for the reception of the broadcast", as the result of the decision of the Court below, "he can now impose an additional charge on those in the station's service area who choose to subscribe to the reception service provided by a CATV". The argument proceeds from a false premise to an insupportable conclusion.

The copyright owner is not compensated by the broadcasting station for "the reception of the broadcast" by anybody, but is, rather, compensated by the broadcasting station for the privilege, personal to it, of publicly performing the copyrighted work by broadcasting it. Unlike petitioner, neither the copyright owner nor the broadcasting station "imposes", or otherwise makes any charge for the reception of the broadcast. Neither do those who utilize the broadcasting station's facilities to advertise their wares. They hope, of course, that such advertising will increase their sales,

but viewers of television broadcasts are free to purchase, or not, the advertised products, wholly as they see fit.

While it may be assumed that in charging advertisers, a broadcasting station takes into account, among other things, its program costs, including copyright royalties, and that the expense of advertising a product, like other costs of sales, is reflected in its price, petitioner's claim, Pet. 40, that copyright royalties paid by broadcasting stations are for this reason a "charge" on viewers, as such, is wholly without foundation. For, excepting only the charges which petitioner and other CATV operators make of their subscribers, viewers of television programs are charged nothing, and pay nothing for viewing them. Of course, they, as well as non-viewers who purchase a product which is advertised in any manner, pay a price for it that includes a factor for the cost of advertising it through all media used —newspapers, radio, periodicals, billboards, direct-mail campaigns, etc., as well as television; and the segments of the public reached by the different advertising media are not, of course, mutually exclusive. Thus, while advertising costs are in their totality "borne by the public who patronize the advertiser", Pet. 40, there is no basis whatsoever for concluding that the cost, or any element making up the cost of advertising the product in any one of the media used, is borne by purchasers from among the segment of the public reached by such medium. Accordingly, to say with particularity, as the petitioner does, Pet. 40, that copyright royalties paid by a broadcasting station are "a charge on those in the station's service area", i.e., are paid for by viewers of its broadcasts, is to indulge in pure conjecture.

Petitioner's "second payment" argument is wholly without validity, for the plain reason that neither it, nor its subscribers, as such, nor as viewers of television broadcasts, now make any payment referable to the copyright royalties paid by the broadcaster. The decision of the Court below is, in effect, that the copyright owners are entitled to compensation *from petitioner* for *its* retransmissions to its subscribers, for profit, of broadcasts of their copyrighted works. The payment of such compensation is an ordinary business expense and petitioner will, of course, have the option of either passing it on to its subscribers by increasing the fees it charges them, or of absorbing it, by reducing its shareholder's profits.[10]

3. Petitioner's contention that in consequence of the Federal Communications Act, policies thereof and regulatory action thereunder of the Federal Communications Commission, it has a license implied-in-law, or is otherwise immune from copyright liability, is equally without substance, and the holding of the Court below that petitioner has no such license or immunity is altogether correct.

Petitioner indulges in a confusion of identities, and distorts the decision of the Court below, when it says, Pet. 47-53, that under it the public is denied "the right to receive authorized broadcasts within the service area of the broadcasting stations as measured under F.C.C. regulations". Pet. 47. Clearly, the decision of the Court below does nothing of the kind. The holding below is that the *petitioner* infringes copyrights

[10] See Seiden, *An Economic Analysis of Community Antenna Television Systems and the Television Broadcasting Industry, Report to the Federal Communications Commission* (Government Printing Office, 1965), esp. Table 9 at p. 28, and Table 10 at p. 30, indicating the profit ratios of CATV systems, by size, in terms of numbers of subscribers, as ranging up to 72 percent of revenues and 59 percent of capital.

when, without licenses from the copyright owners, *it* receives and retransmits broadcasts of the copyrighted works, for profit, to its 15,000, or so, subscribers. Nor is "the public * * * restricted in any way" by the decision of the Court below, "in the antenna it could erect or use for reception". Pet. 48. The restriction is wholly on petitioner, not to receive and retransmit to its subscribers, for profit and without license, broadcasts of copyrighted works, on pain of being held an infringer.

The emptiness of petitioner's position is demonstrated by the avidity with which it seizes upon, and argues from what may be an infelicitously phrased dictum of the Court below, Pet. 48-53, 23a, to the effect that *if* petitioner's subscribers were able satisfactorily to receive by ordinary means the broadcasts petitioner retransmits to them ("no such viewers were shown to be among [petitioner's] * * * subscriber's", Pet. 20a, fn. 13) *then,* "it might * * * be contended that a copyright holder licensing a broadcast * * * *must be held to have licensed* their viewing of the work". [Emphasis supplied] The Court below was fully aware that it is the performing of a copyrighted work in public, not the viewing of it by the public, that requires the copyright owner's license. What the Court below is to be taken as suggesting is that *if* the circumstances posited were the fact, it *might* be contended that *to that extent* petitioner's operations were sanctioned by licenses *implied-in-fact.* As already noted, however, the issue as to whether there were licenses implied-in-fact was reserved by the District Court for later trial and decision, which still lie in the future, and no such question was before the Court below upon the interlocutory appeal taken to it. Pet. 2a, 3a, 9, fn. 4. In-

deed, in suggesting the point, the Court below expressly stated, Pet. 23a, that it did "not decide" it.

Petitioner confuses, Pet. 49, the dictum of the Court below on the point which it thus left expressly undecided, Pet. 23a, with its holding, Pet. 22a, that "the Federal Communications Act * * * was not intended to preempt the application of the Copyright Act", certainly, "at least", where petitioner's "subscribers could not receive the licensed broadcaster's signals satisfactorily by normal antennas". In concluding that no license *implied-in-law* could be constructed on the Federal Communications Act, the Court below thus properly directed its holding to the facts before it, for as it noted, Pet. 20a, text and fn. 13, none of petitioner's subscribers "were shown" to be able to "receive the broadcasts through normal rooftop antennas", and, as the Court below added, petitioner "has apparently never contended that they could". Pet. 21a, 22a, fn. 14.

Petitioner, Pet. 48, however, erroneously takes the holding of the Court below to be that it has a license implied-in-law to retransmit broadcasts of copyrighted works to such of its subscribers as can receive "the licensed broadcaster's signals satisfactorily by normal antennas". Pet. 23a. Petitioner's argument, Pet. 47-53, both proceeds from, and is addressed to this completely mistaken reading of the decision of the Court below, and is, accordingly, wholly irrelevant. It is, moreover, entirely devoid of substance. For, even assuming *arguendo* that, as petitioner mistakenly claims, Pet. 48, the Court below "erected a negative test", such "test" is not, as petitioner claims, at odds with the "B contour" concept to which the Federal Communications Commission's "carriage require-

ment", Pet. 47, 48, is geared.[11] For, the "B contour" concept in not sacrosanct. Thus, in promulgating its "carriage requirement", the Commission said, *First Report and Order,* 38 FCC 683, 718 (1965):

> Moreover, we note another qualification. We have used the concepts of principal community, grade A, and grade B contours, already embodied in our rules * * * . Once again, we stress that we are using signal contours as useful rules of thumb.

The Commission then made it clear that the "contour" concept would not apply when it did not reflect the fact, saying, 38 FCC at 730, 731:

> In dealing with * * * the carriage * * * requirements, we have made liberal use of the * * * contour concepts * * *. * * * these references were entirely to predicted contours. As we have stated several times, however, signal contours are, in the present context, useful rules of thumb. And, as we have repeatedly recognized, the methods of prediction * * * are based on * * * assumptions as to terrain and other factors, which may not necessarily hold true in an individual instance. In the absence of other information, predictions based on our rules will be regarded as creating a prima facie presumption as to the location of signal contours. * * * however, any party, will be free to make a showing that, because of terrain or other factors, the contours lie elsewhere.

Thus, as the Court below noted, the Federal Communications Commission itself has recognized that "under actual conditions, the true coverage may vary greatly

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[11] "* * * the requirement in the Commission's CATV rules that a CATV system carry upon request the signal of any station 'within whose Grade B contour the system is located.'" Pet. 47, 48.

from" the "B contour" rule of thumb. Pet. 21a, 22a, fn. 14. The Commission's ultimate test, like the "test" attributed to the Court by petitioner, is actual, reasonably satisfactory reception. Pet. 21a. Neither the policy of the Communications Act nor the Commission's regulatory action thereunder, requires that petitioner have a license implied-in-law to receive and retransmit a television station's broadcasts of copyrighted works to subscribers who, while within the station's "B contour", are not actually so located as to be able to receive "service acceptable to the media observer", Pet. 21a, without the aid of a retransmission service such as petitioner's. While such viewers may hypothetically be within the station's "service area", they are not so in fact.

Petitioner's reliance, Pet. 47, on the Commission's "carriage requirement" as a basis for a license implied-in-law, suffers from another fatal infirmity. The Commission has made it unmistakably plain that its "carriage requirement" is to be taken as being completely subordinate to, and not one whit in derogation of copyright. Thus, in reaffirming, and extending the applicability of its "carriage requirement" the Commission said, *Second Report and Order,* 2 FCC 2d 725, 768, 769 (1966):

> * * * our decision is not intended to affect in any way the pending copyright suits, involving as they do matters entirely beyond our jurisdiction. We have simply taken into account the existing practices of CATV systems and the present inability of program suppliers to control the availability of their programs via CATV. * * * the fact that we have given the local station the right to have its signal carried over the CATV system * * * affords no defense to that system in a copyright suit. The

> station cannot bestow broadcast or transmission rights to programming which it does not own (or as to which it has not obtained a license to do so). * * * In short, if the copyright suits are decided adversely to the CATV industry, we may * * * have to revise our rules.

As the Court below noted, Pet. 23a, the Commission said earlier that it was "unnecessary" for it to incorporate in its rules "an express declaration that nothing in them is intended to affect, in any way, the copyright or other rights that broadcasters or others may have in television program material". *First Report and Order,* 38 FCC 683, 740 (1965).

And when CATV systems argued the converse to the Commission, i.e., that its "carriage requirement" should be rescinded[12] because of the decision of the District Court in this very case, the Commission made it plain that upon application, it would waive the carriage requirement for CATV systems which complied with such decision, and followed a policy of securing "copyright clearance". Thus, in its *Memorandum Opinion and Order*, 6 FCC 2d 309, 314 (1967) the Commission said:

> Finally, * * * we shall refer only briefly to copyright argument that has been advanced that in light of the district court's decision in the *United Artists* case * * * systems should not be required to carry local signals unless afforded complete copyright immunity by the stations requesting carriage. As stated * * * our rules are based on the present situation in which the CATV system

[12] In *U.S.* v. *Southwestern Cable Co.,* No. 363, October Term, 1967, cert. granted, October 23, 1967, 36 LW 3167, one issue is the validity of the Commission's CATV regulatory rules, as applied to non-microwave CATV systems like those of the petitioner here. Pet. 52.

> operates without regard to copyright clearance. * * * As to the above argument, the short answer is that it is up to the system to determine whether to follow the district court's decision or the present industry practice, but it cannot properly obtain a waiver of our carriage rules when it follows a selective policy in this respect (i.e., ignoring copyright in the case of distant signals and purporting to follow it as to local signals). We believe that in light of present industry practice, no revision of our rules is needed, and that we should, therefore, deal with any situations of this sort by waiver, when and if they arise. * * *

The Commission has gone so far to leave no room for doubt that its "carriage requirement" is subordinate to copyright as to caution television stations "to take into account the effect of any copyright decision in making requests for carriage under the present rules". *Second Report and Order,* 2 FCC 2d 725, 769, fn. 51a. See fn. 11, *supra,* p. 40.

Accordingly, it is *not* true to say, as petitioner does, Pet. 55, that "What the F.C.C. requires CATV systems to do * * * would, under the decision below, make the system liable for copyright infringement", and that "Since the systems are required to carry the local station's signal—compulsory carriage in the 'B' contour—the CATV is caught between requirement of the law and the copyright proprietor's demands". Petitioner would convert the "carriage requirement" which the Commission expressly subordinated to obligations under copyright law, into any instrument for evading them.

Farmers Union, 360 U.S. 525 (1959) on which petitioner relies, Pet. 55, does not support its position. There it was held that a broadcasting station permitting

a political candidate to broadcast over its facilities in accordance with the provisions of § 315 of the Federal Communications Act, which expressly denies stations the right to censor such broadcasts, was not subject to an action for libel on account of what the candidate said. In reaching that conclusion this Court noted that while the Congress had failed to pass legislation granting stations immunity in this situation, 360 U.S. at 533,

> * * * the Federal Communications Commission * * * has long interpreted § 315 as granting stations an immunity. * * * Not only has this interpretation been adhered to despite many subsequent legislative proposals to modify § 315, but with full knowledge of the Commission's interpretation Congress has since made significant additions to that section without amending it to depart from the Commission's view.

The circumstances here could hardly be more different.

4. There is no substance to petitioner's contention that "anticompetitive" considerations require that the rights of copyright owners be construed away, or be given away by constructing a license implied-in-law, to the end that CATV be immune from copyright liability. Indeed, such considerations point in the other direction.

Copyright is a limited monopoly expressly sanctioned by the Constitution, Article I, section 8, clause 8, and granted by the Congress in order "'to afford greater encouragement to the production of literary works * * *'". *Washingtonian Pub. Co., Inc* v. *Pearson,* 306 U.S. at 36. That, like all other rights, copyright may be subject to abuse, is no ground for construing the Copyright Act "so narrowly * * * as to deprive

those entitled to their benefit of the rights Congress intended to grant." *Bobbs-Merrill,* 210 U.S. at 346. Petitioner points to "possibilities of harmful competitive consequences", Pet. 26-28, and to the enhancement of the "economic power to control television" that might result, Pet. 42, if petitioner, and others engaged in the business or retransmitting television broadcasts to their subscribers for profit, should be required to give recognition to the "monopoly * * * expressly granted [to copyright owners] of all public performances [of their works] for profit". *Buck,* 283 U.S. at 197. But there are ready means of dealing with such abuses when, and if, they arise, and the possibility that an innocent right may be abused is no ground for its curtailment or destruction, by construing it away, or otherwise. Petitioner's argument suggests that the right of private ownership of dwelling houses should be abolished or curtailed, because such right "raises possibilities" of their being used as instrumentalities for illegal purposes. It has, however, never been thought necessary to go that far.

The Congress has endowed the antitrust laws with a variety of sanctions, and a whole arsenal of means of enforcement, fully adequate to prevent violations when they are threatened, and to redress them, and punish violators, when they occur. The antitrust laws are sufficiently versatile to deal adequately with violations threatened or effected through the instrumentality of copyright. See e.g., *U.S.* v. *Loew's, Incorporated,* 371 U.S. 97 (1962); *U.S.* v. *Paramount Pictures* 334 U.S. 131 (1948); *Interstate Circuit, Inc.* v. *U.S.,* 306 U.S. 208 (1939); *Alfred Bell & Co.* v. *Catalda Fine Arts, Inc.,* 191 F. 2d 99, 105 (2d Cir. 1951); *Second Report and Order,* 2 FCC 2d at 778. There is no need, nor

would it be appropriate to sacrifice any of the good that copyright protection does, to prevent the evils of wholly conjectural restraints of trade.

Petitioner's argument in this regard would appear to be wholly captious, for the shoe is very much on the other foot. The Federal Communications Commission has made it clarion clear that it found it necessary in the public interest to adopt its "carriage requirement"—the very rule on which petitioner would rely for immunity from copyright—and its related "non-duplication" and "distant signal " rules, "to ameliorate the risk that the burgeoning CATV industry would have a future adverse impact on television broadcast service, both existing and potential". *Second Report and Order,* 2 FCC 2d 725, 736 (1966). That risk the Commisison found in the unfair competition between CATV and broadcasting, in that broadcasters pay for their programs, while "CATV carries them without paying anyone * * * " for them. *First Report and Order,* 38 FCC 683, 703-706 (1965); *Second Report and Order,* 2 FCC 2d at 778-781. Underlying this anomaly, and "central" to the Commission's "evaluation of the nature and effects of competition between CATV and television broadcasting" is " the present inability of program suppliers to control the availability of their programs via CATV", due to the refusal of CATV to recognize copyright. *First Report and Order,* 38 FCC at 740; fn. 32 at 704; See also, *Second Report and Order,* 2 FCC 2d at 768. The Commission observed, 38 FCC at 702 that:

> When a cable [i.e., CATV] system brings to a [broadcasting] station's market additional signals which would not be readily available in the system's absence, it introduces competition for audi-

> ence attention—and audience attention is the basic commodity that a station sells to advertisers.[13]

Furthermore, the Commission observed, 38 FCC at 702, 703, the "competition between CATV systems and [broadcasting] stations is marked" by a feature "not present in the ordinary competition between broadcasting stations":

> * * * the system—while carrying the signals of distant stations—may not carry the signals of a local station which the subscriber is otherwise able to receive. Upon installation of the cable, the CATV operator may not provide the subscriber with a switch enabling him to choose between off-the-air reception and cable reception. * * * A gain of a subscriber to the system will in most cases mean the effective loss of a potential viewer for the local station.

In short, the Commission found, 38 FCC at 704, 705, and reaffirmed in *Second Report and Order,* 2 FCC 2d at 778-781, that:

> The * * * situation is in many ways an anomalous one. From the point of view of an existing station, the CATV may—in providing its subscribers with the signals of distant stations—duplicate programs for which the station has bid and obtained exclusive exhibition rights. No other station in the same market could normally obtain access to those

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[13] Two local television stations serve Clarksburg and Fairmont, W. Va., where petitioner's CATV systems operate. The Court below noted that in 1960, the "number of subscribers of each system was over half the number of occupied housing units * * * in the area they served". Pet. 4a. The figures more closely approximated 72% and 73%, respectively, according to the District Court. 255 F. Supp. at 187; JA 36, 37.

programs without effectively outbidding the local station in the program market. * * * CATV, however, carries them without paying anyone or engaging in any bidding process. From the point of view of an entrepreneur considering the establishment of another station in the same market, the situation is even more anomalous. Over and above his inability to obtain program exclusivity, as against the CATV system, the very programs which he cannot obtain from program suppliers (because the existing station has been given exclusive exhibition rights in those programs) are made available in the market by the CATV without any payment or bidding process.

* * *

In light of the unequal footing on which broadcasters and CATV systems now stand with respect to the market for program product, we cannot regard a CATV system's duplication of local programming via the signals of distant stations as a fair method of competition.

This "competition", the Commission noted, 38 FCC at 700, 701

* * * is not between basically similar entities, which offer similar benefits to the public. On the contrary, if CATV operations should drive out television broadcasting service, the public as a whole would lose far more—in free service, in service to outlying areas, and in local service with local control and selection of programs—than it would gain.

* * * In dealing with competition between broadcasters * * * "* * * The public interest is not disturbed if A is destroyed by B, so long as B renders the required service." * * * But if CATV competition should destroy a broadcasting operation, the CATV would not thereafter "render the required service".

The Commission took note of the case here at bar, 38 FCC at 704, fn. 32, and said:

> We neither intimate nor express any view as to the merit of these suits, which fall beyond our jurisdiction. We cannot close our eyes, however, to the significance which the present inability of program suppliers to control the availability of their programs via CATV has for competition between CATV and broadcasting stations.

The Commission struck at the very root of the matter when it said, 38 FCC at 706:

> We believe that a service such as CATV, which lives on the product of the existing television system and finds its justification as a supplementary service, should at a minimum give some measure of recognition to the fundamental distribution practices that have developed in the parent industry's competitive program market—to exhibition rights for which others must bargain and pay but which it has thus far been able to use without any bargaining by itself or by the stations whose signals it carries.

In sum, it is clear that the root of the evil that threatened the public interest objective of the Federal Communications Act to encourage "a multiplicity of local station outlets", *First Report and Order,* 38 FCC at 700, and to frustrate its achievement sufficiently to impel the Federal Communications Commission to adopt its "carriage requirement" and its related "nonduplication" and "distant signal" rules, was the adamant refusal, which still persists, of CATV operators, including petitioner, to recognize copyright. See, *passim First Report and Order,* 38 FCC 683-746 (1965). *Second Report and Order,* 2 FCC 2d, 725-808 (1966). In these circumstances, it is strange audacity for petitioner to put forward its empty claims that "anti-

competitive consequences", Pet. 42, or, for that matter, "communications" considerations require that it be given immunity from copyright.

IN CONCLUSION

Finally, it must be noted that petitioner's doleful prediction of the dire consequences which will befall the CATV industry if the decision below stands, Pet. 24, 25, is unabashed *fulmen brutum*. Petitioner is well aware that the number of "subscribers" to "the average CATV system", Pet. 25, is no measure of the financial stature of those who operate CATV systems. Indeed, as petitioner must also be well aware, the roster of corporations owning and operating CATV systems, directly or indirectly, is star-studded with financial giants.[14] The CATV industry is reliably reported to have "annual revenue of over $150 million"[15] and profit ratios ranging up to 72 per cent of revenues and 59 per cent of capital.[16] A leader of the CATV industry confidently predicts annual revenues for the industry in the near future of 2.3 billion dollars.[17]

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[14] See, *Copyright Law Revision*, Hearings on S. 1006, fn. 8 p. 28, *supra*, p. 238; *Hearings on H.R. 4347*, etc., fn. 9, p. 29, *supra*, Part 2, pp. 1375-1377; Copyright Law Revision, 113 Cong. Rec. H3857, at H3880, H3881, April 11, 1967, remarks of Hon. Emanuel Celler; Television Fact Book, 1967 Ed., No. 37, Service Volume, pp. 568a-583a. The Wall Street Journal, May 8, 1967, p. 9, col. 4, reported the sale to one purchaser of about 4% of the stock of a leading CATV operator, having a market value in the neighborhood of $5,250,000.

[15] H. Rep. No. 83, 90th Cong. 1st Sess., 1967, p. 49.

[16] Seiden, *loc. cit. supra*, fn. 10, p. 37.

[17] *Television Digest*, July 3, 1967, p. 2. Indeed, CATV systems have been described as "money machines". *Broadcasting*, March 8, 1965, p. 32; cf. *Business Week*, Dec. 12, 1964, p. 34; *id.* May 1, 1965. p. 30.

Suppliers of copyrighted filmed television programs, like respondent, quite naturally look upon the CATV industry as, potentially, a very substantial customer for their products, and they are fully aware that it would hardly be in their interest to endanger this source of business, whatever their rights, *strictissimi juris,* may be. This is evidenced, if by nothing else, by their voluntary agreement, now in effect, not to sue CATV systems for infringement so long as current mutual efforts to reach "contractual arrangements" and to resolve differences over proposed amendments to the Copyright Law Revision Bill, continue.[18]

In any event, in view of the three-year statute of limitations on actions for copyright infringement, Copyright Act, § 115(b), the CATV industry's potential liability for its intransigence is substantially less than it would have been, had copyright owners not been more disposed to arriving at "contractual arrangements" than to litigate. For, in addition to this action, so far as respondent has been able to ascertain, only one action has been commenced against a CATV system for copyright infringement.[19] Petitioner's fears for the CATV industry if the decision below stands, are groundless.

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[18] See, Extension of Duration of Copyright Protection in Certain Cases, 113 Cong. Rec. S14067, October 3, 1967, remarks of Hon. John L. McClellan.

[19] *Columbia Broadcasting System* v. *Teleprompter Corporation,* Civil Action No. 64-3814, U.S. District Court for the Southern District of New York. This action is still pending.

For all of the reasons hereinabove set forth, the petition should be denied.

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APPENDIX

Sections 1(c) and (d) of the Copyright Act (17 U.S.C. §§ 1(c), (d)) provide as follows:

> Any person entitled thereto, upon complying with the provisions of this title, shall have the exclusive right:
>
> * * *
>
> (c) To deliver, authorize the delivery of, read, or present the copyrighted work in public for profit if it be a lecture, sermon, address or similar production, or other nondramatic literary work; to make or procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, delivered, presented, produced, or reproduced; and to play or perform it in public for profit, and to exhibit, represent, produce, or reproduce it in any manner or by any method whatsoever. The damages for the infringement by broadcast of any work referred to in this subsection shall not exceed the sum of $100 where the infringing broadcaster shows that he was not aware that he was infringing and that such infringement could not have been reasonably foreseen; and
>
> (d) To perform or represent the copyrighted work publicly if it be a drama or, if it be a dramatic work and not reproduced in copies for sale, to vend any manuscript or any record whatsoever thereof; to make or to procure the making of any transcription or record thereof by or from which, in whole or in part, it may in any manner or by any method be exhibited, performed, represented, produced, or reproduced; and to exhibit, perform, represent, produce, or reproduce it in any manner or by any method whatsoever * * *